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No. 06-827

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IN THE
Supreme Court of the United States

ZACHARY HRASKY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition provides no reason for this Court to brush aside the escalating confusion and uneasiness over the scope of the *Belton* doctrine. Indeed, the more the Government strains to defend the improbable result here, the more it becomes apparent that this Court's intervention is urgently needed.

I. This Court Should Resolve Whether Arresting Petitioner Beyond "Reaching Distance" from His Vehicle Entitled the Officers to Search His Vehicle Incident to that Arrest.

A. The Government asserts that no conflict exists over whether *New York v. Belton*, 453 U.S. 454 (1981), applies when police officers arrest people beyond reaching distance from their vehicles because (1) all of the apparently conflicting cases can be sorted according to whether "arresting officers *first encountered* defendants some distance away from their vehicles" and (2) this Court's decision in *Thornton v. United States*, 541 U.S. 615 (2004), resolved any disagreement in any event. BIO 10-11 (emphasis added). Neither of these arguments withstands scrutiny.

1. The Government is wrong in suggesting that the split of authority the Seventh Circuit recently identified (and that the Petition for Certiorari explicates at greater length) breaks down according to whether officers "first encountered" arrestees beyond reaching distance from their cars. In several of the cases the Petition cites holding that *Belton* applies even when officers arrest people beyond reaching distance from their cars, the officers first encountered the arrestees beyond reaching distance from their cars as well. *Rainey v. Commonwealth*, 197 S.W.3d 89, 91 (Ky. 2006) (arrestee was fifty feet from his car when officers first made contact with him), *cert. denied*, 127 S. Ct. 1005 (2007); *Penman v. Commonwealth*, 194 S.W.3d 237,

250-51 (Ky. 2006) (arrestee was almost one block away); *Black v. State*, 810 N.E.2d 713, 713-14 (Ind. 2004) (suspect was inside an auto shop when police initiated contact). This fact was immaterial, under these courts' conception of *Belton*, because a lack of "accessibility of the arrestee to items in his vehicle is not a basis for justifying or denying the search." *Rainey*, 197 S.W.3d at 94. The fact that the arrestee occupied a car at some point during the events leading up to his arrest automatically justifies the search, regardless of where the arrestee was when the police arrested or first encountered him. *See Black*, 810 N.E.2d at 715-16.

In contrast, courts holding that *Belton* does not apply when officers arrest someone beyond reaching distance from a vehicle reason that, even though the arrestee occupied a car during the events leading up to his arrest, officers may not search the vehicle if "at the time the person was arrested" the car was clearly beyond his reach. *State v. Robb*, 605 N.W.2d 96, 101 (Minn. 2000); *see also United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (key is whether arrestee had access to car "immediately preceding or at the time of his arrest"); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (key is arrestee's location "when arrested"); *State v. Dean*, 76 P.3d 429, 437 (Ariz. 2003) (key is the "physical distance of the arrestee from the vehicle at the time of arrest"). This method of assessing the validity of *Belton* searches – in contrast to method in the Eighth Circuit, the Seventh Circuit, and the Kentucky and Indiana Supreme Courts – precludes such searches when officers arrest people beyond reaching distance from their vehicles, irrespective of whether officers first encounter the people closer to the vehicles.

2. Far from resolving the conflict identified here, this Court's opinion in *Thornton* expressly "decline[d] to address" whether *Belton* applies when an officer arrests someone beyond "'reaching distance' of [his] car." 541 U.S. at 622 n.2.

It thus is irrelevant that some of the conflicting cases cited in the Petition for Certiorari predate *Thornton*.

Indeed, the only relevance *Thornton* has to the issue here is that it negates the Government's suggestion that conflicting *Belton* cases can be harmonized according to where the defendant was when the police first encountered him. BIO 10, 11. *Thornton* explains that while an officer's authority to search an arrestee's car "may turn on [the arrestee's] temporal or spatial relationship to the car at the time of arrest and search, it certainly does *not* turn on whether he was inside or outside the car *at the moment when the officer first initiated contact with him*." *Id.* at 622 (emphasis added and footnote omitted). This passage erases any doubt that the cases identified in the Petition for Certiorari form a true and intractable division of authority.

B. The Government also contends that the issue whether *Belton* allows vehicular searches incident to arrests beyond reaching distance from vehicles is "not well presented in this case" because petitioner's brief in the Eighth Circuit focused on the temporal, instead of spatial, proximity to the search of petitioner's vehicle. BIO 7. It is not petitioner, however, but the Government that keeps changing its position in this case.

In the district court, petitioner argued that the search of his vehicle violated either the temporal or spatial limitations on the *Belton* doctrine. That is, either the officers arrested him when they first handcuffed him (at 3:50 pm), in which case the search occurred too long after his arrest, or the officers did not arrest him until they finally decided not to release him with a citation (at 5:00), in which case the arrest occurred too far from his vehicle to justify a *Belton* search. Pet. App. 27a-29a. The Government responded that "once you handcuff a person . . . you've basically effectuated your arrest," but that the search here was sufficiently contemporaneous to petitioner's arrest because his own actions delayed the search of his car. Tr. of

Suppression Hearing 81 (Jan. 26, 2005). The district court accepted the Government's suggestion that petitioner was arrested the moment he was handcuffed but held that the search was too remote in time from his arrest. Pet. App. 29a-33a. The court explained that regardless of who was responsible for the delay between the arrest and the search, the temporal justification for conducting a *Belton* search had dropped away by the time the officers searched petitioner's vehicle. *Id.*

The Government attacked the district court's ruling by changing its position on appeal concerning when the arrest occurred. There, it argued that "[t]he entire course of events between law enforcement and the defendant, between 3:50 pm and 5:00 pm on July 2, 2004, was determining *whether* the defendant would be arrested. That decision was not made until 5:00 pm." Gvt. C.A. Br. 17; *accord id.* at 9, 14, 20-21 (emphasis added). The Eighth Circuit accepted this argument, holding that the officers did not arrest Petitioner "in the sense that underlies the doctrine of searches incident to arrest" until they decided not to let him go with a citation. App. 6a-7a. Under this conception of the events, there is no temporal proximity problem because, as the Government put it, "[t]he search of the truck occurs two minutes after the final decision is made to arrest the defendant." Gvt. C.A. Br. 17.

Having persuaded the Eighth Circuit to base its ruling on the assumption that petitioner was not arrested until 5:00 pm, the Government – in response to the spatial proximity problem that this creates and that the Petition for Certiorari emphasizes – has changed its position again. It now says that "there is considerable confusion as to when petitioner was arrested." BIO 15.

The Government is arguing in circles. Petitioner's position, however, is the same as it ever was: either the police arrested him as soon as they handcuffed him, in which case the search is invalid because did not occur until over one hour after

his arrest, or the police did not arrest him until he was already handcuffed in the back of a police car, in which case the search was invalid because he was far beyond reaching distance from his car. That the Eighth Circuit's opinion (at the Government's urging) focuses on the latter permutation but largely disregards the spatial proximity problem its decision produces is not an argument for denying certiorari. It highlights the manipulability of the *Belton* doctrine, implicates a split of authority, and counsels in favor of review.

C. The Government's current argument on the merits – that the search was valid because the police "first made contact" with petitioner when he was inside and therefore within reaching distance his car (BIO 9) – flouts this Court's precedent. Both *Thornton* and *Belton* make clear that the validity of a vehicular search incident to arrest "certainly does *not* turn on" the arrestee's location when "the officer first initiated contact with him." *Thornton*, 541 U.S. at 622 (emphasis added); *see also id.* at 620 ("[W]e placed no reliance on the fact that the officer in *Belton* . . . initiated contact with [the arrestees] while they remained within [the car]."). If the point of contact were determinative, officers who encountered and arrested someone inside a car could search the car even after removing him (or the car) from the scene – a result that the Eighth Circuit has condoned, *see* Pet. App. 5a (citing cases), but that the Government itself has expressly disavowed because it conflicts with this Court's precedent, *see* U.S. *Thornton* Br. 30-31 (citing *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968); *Preston v. United States*, 376 U.S. 364, 367-68 (1964)).

"An officer may search a suspect's vehicle under *Belton* only if the suspect is *arrested*." *Thornton*, 541 U.S. at 621 (citing *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998)) (emphasis added). Accordingly, the validity of a vehicular search incident to an arrest turns on the arrestee's location "at the time of the arrest and search," not at the time the police first

encounter him. *Id.* at 622. The simple fact is that when a person is arrested beyond reaching distance from his vehicle, the arrestee cannot grab any "weapon[s] or evidentiary items," *Chimel v. California*, 395 U.S. 752, 763 (1969), inside of the vehicle. This is a bright-line truism that requires no snap decision making and that automatically resolves the Fourth Amendment calculus.

II. This Court Should Reconsider *Belton* at Least to the Extent that It Allows Exploratory Searches of Vehicles Incident to Arrests for Nothing More than Traffic Violations.

The Eighth Circuit's holding and the Government's ever-shifting defense of the search here underscore the need for this Court to reconsider the *Belton* doctrine. The Government, in fact, does not even dispute that because it is standard police practice to restrain arrestees in police cars before searching arrestees' vehicles, *Belton*'s basic assumption that arrestees might grab something in the vehicles is a pure legal fiction. *See* Pet. for Cert. 16-18. Nor does the Government dispute that *Belton*'s lack of empirical foundation renders the search-incident-to-arrest authority it confers prone to abuse. *See id.* 18-20. The Government nevertheless opposes reexamining *Belton* on the grounds that (A) the doctrine is necessary to give clear guidance to police officers; (B) this Court's decision in *United States v. Robinson*, 414 U.S. 218 (1973), precludes taking into account whether a person was arrested merely for a traffic offense; and (C) this case is an imperfect vehicle for revisiting *Belton*. None of these assertions has merit.

A. The Government's suggestion that "*Belton* establishes an appropriate bright-line rule for searches incident to custodial arrest" (BIO 14) is incorrect. The Government itself has acknowledged that even when the police arrest a person inside or beside a car, *Belton* does not apply once the police take an arrestee away from the scene. *See supra* at 5. How the

Government draws a line between taking arrestees away from the scene and incapacitating them in the back seats of patrol cars is unclear. Nor does the Government even try to explain how *Belton* provides clarity with respect to its "necessarily rather vague" temporal proximity requirement. *United States v. Pittman*, 411 F.3d 813, 816 (7th Cir. 2005); *see also* Pet. for Cert. 21-22 & n.5.

In truth, the only way in which *Belton* even arguably provides clear guidance is in its insinuation that "the ability to search a vehicle incident to the arrest of a recent occupant [is] a police entitlement rather than an exception justified by the twin rationales of [*Chimel*]." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part). A recent case from Texas illustrates the point. There, officers "conducted surveillance of a 2000 white Cadillac Escalade" – apparently without any reasonable suspicion that anyone inside was engaged in criminal activity – until the officers observed the driver "turning into a parking lot without using his turn signal." *Mares v. State*, 2007 WL 268369, at *1 (Tex. App. Feb. 1, 2007). The driver parked in front of a Starbucks, and the officer followed him inside. Thirty minutes after confronting him and learning that his license was suspended, the officers told the driver (still inside the coffee shop) that he would be arrested. Shortly thereafter, the driver's girlfriend arrived and he gave her the key to his car. But the officers told her that "she would not be allowed to drive away with the vehicle." *Id.* at *2. The officers then searched the driver's car, under the theory that the driver was a "recent occupant," and found illegal drugs. The Texas Court of Appeals upheld the search, stating that "[b]ut for [the driver's] having quickly exited the Escalade and entering the coffee shop, [he] would still have been in his vehicle at the time [the officer] confronted him, and would have been arrested in his vehicle immediately after answering the questions that led [the officer] to conclude he was operating a vehicle with a suspended license." *Id.* at *4. In other words, the court reasoned that *Belton* gives the police the right to search

vehicles when they arrest drivers, so drivers cannot defeat that right by relinquishing control over their vehicles before any arrest or search occurs.

The problem with this reasoning is that conducting a search incident to arrest "is not the Government's right; it is an exception – justified by necessity – to a rule that would otherwise render the search unlawful." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment). When the police arrest a driver far from his car for an offense for which there is not even reason to believe the car might contain evidence, there is simply no justification in this Court's traditional Fourth Amendment jurisprudence for searching the car. To the extent that the *Belton* doctrine permits such otherwise unconstitutional searches in order to provide clear guidance to police officers, the doctrine is indefensible.

B. Nothing in *Robinson* precludes this Court from considering the nature of the offense for which a person is arrested in assessing the legality of searching his vehicle incident to that arrest. *Robinson* held that even when the police arrest someone for an offense for which no tangible evidence might be found, the police may search *the person* incident to the arrest because "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial." 414 U.S. at 234. In other words, when at least one of the two reasons for conducting a search incident to arrest is at least potentially present, the police may conduct such a search.

But when the police arrest a person for a traffic offense and place him inside a police cruiser, *neither* of the two reasons for conducting a search incident to arrest even theoretically supports searching *the arrestee's vehicle* – nor does even the historical motivation of searching for evidence of the crime of

arrest. Pet. for Cert. 23-24. It thus would do no damage to general search-incident-to-arrest jurisprudence to hold that officers may not conduct *Belton* searches at least when they arrest motorists for nothing more than traffic offenses. To the contrary, it would restore some principle and order to that jurisprudence by precluding searches that by definition cannot be justified under *Robinson*, *Chimel*, or any other traditional Fourth Amendment precedent. *See Thornton*, 541 U.S. at 631-32 (Scalia, J., concurring in the judgment); NACDL Amicus Br. 11-16.

In any event, if this Court had qualms about limiting its reexamination of *Belton* to the context of traffic offenses, the solution would be to reconsider *Belton* across the board, not to forego revisiting the doctrine at all. With each passing year, *Belton* allows more police officers to conduct – and more courts to condone – general, exploratory searches in derogation of the first principles of the Fourth Amendment. *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment). It is time for this Court to corral this errant doctrine.

C. This case is clearly a better vehicle for revisiting *Belton* than the two recent cases the Government cites. The Petition for Certiorari here (and supporting amicus NACDL) expressly asks this Court to revisit *Belton* and promises comprehensive briefing on the subject. By contrast, the petition in *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006), *cert. denied*, 127 S. Ct. 1005 (2007), argued only that the Kentucky Supreme Court had misapplied *Belton*. And the petition in *United States v. Osife*, 398 F.3d 1143 (9th Cir.), *cert. denied*, 126 S. Ct. 417 (2005), argued in a perfunctory fashion only that the Ninth Circuit erred in not treating Justice Scalia's *Thornton* concurrence as "control[ling]" law. *Osife* Pet. for Cert. 6. The petition did not address *Belton* itself.

The circumstances of this case also offer a suitable – indeed, compelling – basis for considering the soundness and

workability of *Belton*. Although the Government suggests that the interlocutory posture of the case gives cause to deny review, it does not point to a single fact that might be developed more fully on remand. Nor could it. The entire episode at issue here is captured on a videotape, which is part of the record. Any confusion regarding how to apply these facts to existing law (*see* BIO 15) is a product of *Belton* itself, not of the record here.

Finally, the fact that petitioner was arrested for driving with a suspended license affords this Court a full range of options for revamping the *Belton* doctrine. Pet. for Cert. 22-26. The only evidence that proves the crime of driving with a suspended license (that is, driving with a license that is valid on its face but that the State has revoked) is a DMV record showing the suspension. *See, e.g.*, *State v. Soukarith*, 570 N.W.2d 344, 355 (Neb. 1997). Contrary to the Government's misleading hypotheses (BIO 15), therefore, the officers here could not have found any evidence relevant to the crime of arrest by searching petitioner's vehicle. Nor does the fact that the officers' exploratory search here revealed two firearms in petitioner's vehicle present any obstacle to reconsidering *Belton*. This Court has had "frequent occasion to point out that a search is not to be made legal by what it turns up." *United States v. Di Re*, 332 U.S. 581, 595 (1948); *accord Byars v. United States*, 273 U.S. 28, 29-30 (1927). That the Government, which surely is aware of this hornbook rule, would resort to proffering this untenable defense of the search here (BIO 12, 15) only highlights its inability to defend the *Belton* doctrine on its own terms. This Court should not tolerate this discomforting state of affairs any longer.

CONCLUSION

For the foregoing reasons, as well as those in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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